IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 512

JAMES MURPHY and ROBI MERCER, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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INDEX TO PETITION

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	9
Conclusion	12
Appendix (Opinion of the Court)	13
Judgment	20

CITATIONS

CASES

Giordenello v. United States, 357 U.S. 480	11
Henry v. United States, 361 U.S. 98	10
Johnson v. United States, 338 U.S. 10	11
United States v. Di Re, 332 U.S. 581	11

STATUTES

Title 26, U.S.C., Section 5686(a)	4
Title 26, U.S.C., Section 7608	3

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UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, James Murphy and Robi Mercer, pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Third Circuit in the above case, entered in the above entitled case on May 19, 1961.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania was entered September 26, 1960 and is not reported, but contained in Appendix filed in The United States Court of Appeals for the Third Circuit. The opinion of the United States Court of Appeals for the Third Circuit, affirming the United

States District Court for the Western District of Pennsylvania, was filed May 19, 1961, and is reported in 290 F. 2d 573.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1961 (infra, Appendix, p. 20). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. section 1254 (1).

QUESTIONS PRESENTED

1. Was it error for the United States Court of Appeals to sustain the rule of the United States District Court for the Western District of Pennsylvania, denying petitioners' motion for the return of seized property and suppression of evidence secured by agents of the Treasury Department, when tested under the provision of the Fourth Amendment to the Constitution of the United States?

2. Does the unloading in broad daylight of lawfully obtained sugar which has reached its railroad destination, and its surveillance by agents of the Treasury Department, amount to a misdemeanor committed in the presence of such agents to justify arrest without a warrant and seizure of personal property without a search warrant under the provision of the Fourth Amendment to the Constitution of the United States?

3. Should the felony rule of reasonable ground for belief of guilt, justifying arrest and seizure of property without a warrant, be extended to alleged misdemeanors involving possession of lawfully obtained property as distinguished from contraband?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution. Amendment IV—Searches and Seizures:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Statute. Title 26, U. S. C., Section 7608:

"Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may—

"(1) carry firearms;

"(2) execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

"(3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and

"(4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States."

STATEMENT OF THE CASE

Federal jurisdiction was invoked in the court of first instance for the return of property seized and its suppression as evidence as being in violation of petitioners' civil rights as guaranteed under the Constitution of the United States. The proceedings were civil in nature arising out of alleged violation of Title 26 U. S. C. section 5686 (a).

Petitioners, James Murphy and Robi Mercer, and one Bernard Zilka, on August 29, 1960, were charged in a complaint before the United States Commissioner with violation of Title 26 U. S. C. section 5686 (a) which provides as follows:

"(a) General—It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both."

Petitioners waived a hearing before the Commissioner on August 31, 1960, and moved for the return of property seized on the ground that the property seized and taken from them was seized without warrant and in violation of their constitutional rights by agents of the Treasury Department on August 27, 1960. Testimony was produced at the hearing at the conclusion of which the District Court, on September 26, 1960, denied the motion

for return of seized property and its suppression as evidence.

The Court of Appeals affirmed the judgment of the District Court on May 19, 1961. On this appeal, the original transcript of testimony was used.

On August 25, 1960 at about 2:00 p. m., a freight car containing four hundred 100 lb. bags of Costa Rican sugar arrived from Philadelphia at the private siding and warehouse of James L. Murphy at Forestville, Pennsylvania, on the Bessemer and Lake Erie Railroad. Agents of the alcohol, tobacco tax division of the Treasury Department were informed that James L. Murphy had purchased this sugar through a broker. The sugar was billed to Murphy Products Company, Harrisville, Pennsylvania (Sub Zilka Flour Co.), indicating that Zilka Flour Co., was to be notified upon arrival of the shipment.

The tax agents arrived at the siding at about 5:00 a. m. on August 26, 1960 and remained there intermittently until 11:20 a. m., August 27, 1960, when they saw Robi Mercer, owner of the Mercer Milling Co. of Wilson, N. C., arrive at the siding, driving a tractor trailer registered in the name of Mercer Milling Co., and bearing North Carolina registration plates. At 12:30 p. m., the same day, one Bernard Zilka, a partner in Zilka Flour Co., arrived at the siding, and at 1:30 p. m., two men, employees of James L. Murphy, arrived at the siding and began to transfer the sugar from the freight car to the tractor trailer.

Bernard Zilka assisted in the loading but Robi Mercer remained in the cab of the tractor trailer. The agents who were observing the unloading operation from a distance, drove the government car to the siding and placed

one of the petitioners, Robi Mercer, and one Bernard Zilka under arrest. James Murphy was arrested on August 29, 1960, at the office of the United States Commissioner.

Following the arrest of Mercer and Zilka, the agents seized the shipment of sugar, being the property of James Murphy, a two wheel hand truck, a dock ramp, tractor trailer and $3,846.00 cash from the person of Robi Mercer.

The testimony of the agents disclosed that Robi Mercer and Bernard Zilka, prior to their arrest, had been suspected of disposing sugar from which distilled spirits may be recovered and were under demand letter, namely, to make a return to the Treasury Department of the disposition of any sugar. James L. Murphy was not required to make a return and the agents had no information about him whatever. The return record was required only after a disposition of the sugar under authority of section 5213A I. R. C., in the form and manner specified in Part 173 of Title 26 of the Code of Federal Regulations.

It was conceded by the government that at the time of the arrest, there was no violation of this regulation and it was also conceded that there were no warrants for arrest and seizure issued.

The following is a summary of the testimony of the witnesses:

Henry Jennis: This witness stated that he was an investigator for the alcohol and tobacco tax unit. He arrived at the railroad siding at approximately 5:00 a. m. on Friday morning, August 26, 1960 and he remained there intermittently until approximately 5:00 p. m. on August 27. He knew that a carload of sugar was arriv-

ing and he obtained that information on August 25, 1960. At approximately 11:20 a. m. on Saturday, August 27, 1960, he saw a tractor trailer headed north on Route 8 and this trailer pulled into a railroad siding of the Bessemer and Lake Erie Railroad. This tractor trailer was an International Harvester belonging to Robi Mercer of Wilson, N. C. At approximately 12:30 p. m. on August 27, 1960 he saw a Buick sedan pull into the railroad siding across the tracks from where the tractor trailer was parked and he saw Bernard Zilka of the Zilka Flour Co., Monessen, Pennsylvania, get out of the car and walk to the boxcar containing sugar. Shortly thereafter, another man appeared, got into Zilka's automobile and left the siding for approximately an hour. Just prior to their return a van type truck pulled into the siding and two other men got out, at which time a general conference seemed to be going on. The men went over to the freight car containing the sugar, opened it and began to unload into a tractor trailer which was backed to the freight car by one who appeared to be Robi Mercer. Accompanied by other investigators he drove the Government car to the railroad siding, approached the cab of the truck, looked into the cab and recognized Robi Mercer from a photograph previously furnished him. He climbed into the tractor trailer and placed Zilka and Mercer under arrest. He admitted he had no search warrant or a warrant of arrest. He saw a copy of the bill of lading which directed 400 bags of sugar to Murphy Products Co. with the addenda "S U B Zilka Flour Co.", which indicated that Zilka Flour Co. was to be notified. The Zilka Flour Co. is a bakers' supply house in Monessen, Pennsylvania. This witness further testified that Robi Mercer was apprehended in Wilkes County, N. C. at 3:00 a. m. on a County road, unloading 348 bags of

sugar into a smoke house in the field. At that time he had in his possession a receipt for 348 bags of sugar from Zilka Flour Co. of Monessen, Pennsylvania. Mr. Mercer had a small place of business in Wilson, N. C. with a mill, not used in many years, which was known as Mercer Milling Co. At the scene of the present arrest Robi Mercer was searched and approximately $3,300.00 was found on his person. In addition, $556.00 in cash was found in the trunk of Zilka's car. This witness also testified that Mercer had a prior arrest in North Carolina for possession of sugar with intent to violate the Internal Revenue laws. Zilka had never been arrested for violation of Internal Revenue laws relating to sugar. He further stated that he did not know whether Mr. Mercer would have made a return, after the purchase of sugar, as required under regulations of the Treasury Department and that such returns are made after the purchase has been made. Mr. Mercer was not present when the unloading of the sugar took place. To the witness's knowledge, Mr. Murphy at no time prior to August 27, 1960 engaged in a contract to sell Mercer any sugar. (T. pp. 17-24; 29-48)

Stanley S. Sams: This witness testified that he is a senior investigator for the Treasury Department, Alcohol and Tax Division; that he arrived at the railroad siding on Friday, August 26 and was present when the arrests and seizures were made. He arrived there to conduct observations since he knew a freight car was arriving. The bill of lading was made out to James L. Murphy. He was the one who searched the person of Robi Mercer and took from him over $3,000.00 in cash. He also seized his truck. He stated that Mercer was committed of a violation in his presence but that it was not a felony. (T. pp. 24-27)

REASONS FOR GRANTING THE WRIT

This Court should exercise its jurisdiction in this case for the following reasons:

(1) There is involved herein an important question of federal law which has not been, but should be, settled by this Court.

(2) The Court of Appeals has decided the federal question involved in a way in conflict with the latest applicable decision of this Court.

I

The important question of federal law is: Under the provision of title 26 U. S. C. section 7608, must the arresting officer actually see an offense committed against the United States before he may make a valid arrest and a subsequent seizure of personal property to satisfy the requirement of the Fourth Amendment of the Constitution of the United States?

No reported decision has been rendered which clearly interprets this provision of the law. The first portion of sub section 3 of this act obviously refers to misdemeanors. Since the latter portion makes reference to felonies and permits arrests on reasonable grounds for the belief that a felony has been or is being committed.

A reasonable interpretation, involving misdemeanors, of title 26 U.S.C. section 7608 indicates that Congress intended the commission of some crime in the presence of the arresting officers before he may resort to an arrest without a warrant. Reasonable grounds for the belief that a crime has been committed forms no part of the first portion of section 3 of this act.

The act of unloading lawfully obtained sugar, without more, cannot be construed as a violation of any law of the United States. James Murphy was not present at the scene of the arrest and he was not arrested before his property was seized by the agents of the Treasury Department. He committed no act in the presence of the agents. Robi Mercer committed no act other than to permit the loading of the sugar into a vehicle supplied by him.

If law enforcement officers of the Government are permitted to make arrests without a warrant on reasonable grounds that a crime has been committed or is being committed, this should be limited to cases involving a felony, and the felony rule as enunciated by this Court should not be extended to cases of misdemeanors.

II

The Court of Appeals based its decision on the case of Draper v. United States, 358 U. S. 307. That case can have no application to the facts of the instant case. In that case, a felony, and not a misdemeanor, was involved; the property seized was contraband and not lawful property; the accused was in flight when arrested.

In *Henry v. United States*, 361 U. S. 98, this Court, on facts stronger than in the instant case, reversed a conviction for theft of whiskey from interstate shipment when the arrest and seizure of property was made without a warrant. In that case this Court stated (page 102): "This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen." On page 104 this Court said: "But there was nothing to indicate that the cartons here in issue probably contained liquor. The fact that they contained

other contraband appeared only some hours after the arrest. What transpired at or after the time the car was stopped by the officers is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest."

The Court of Appeals based its decision, in part on the knowledge that the arresting agents had certain information of Mercer's activities which fully substantiated the existence of probable cause. Aside from the fact that Mercer has been arrested once before, but whose case has not been disposed of, cannot be used as justification for a second arrest. The requirement that a misdemeanor committed in the presence of the arresting officer before a valid arrest can be made, was not discussed by the Court of Appeals. In any event, common rumor or report, suspicion, or even strong reason to suspect has been held not adequate to support a warrant for arrest. See *United States v. Di Re*, 332 U. S. 581; *Johnson v. United States*, 338 U. S. 10; *Giordenello v. United States*, 357 U. S. 480. Can it be that less evidence is required to support an arrest without a warrant than is required to support a warrant for arrest?

The officers were not responding to an emergency. They had knowledge that the sugar had arrived on August 25, 1960 and the arrests were not made until August 27, 1960. Ample opportunity was provided, therefore, to obtain a warrant of arrest and a search warrant.

Had the Court of Appeals followed the rule laid down in *Henry v. United States*, supra, the appeal should have been sustained.

CONCLUSION

WHEREFORE, for the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

ALBERT A. FIOK
ALBERT MARTIN
Attorneys for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,424

UNITED STATES OF AMERICA
v.
JAMES MURPHY and ROBI MERCER, *Appellants*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued February 24, 1961
Before KALODNER, STALEY and FORMAN, *Circuit Judges.*

Opinion of the Court

(Filed May 19, 1961)

BY STALEY, *Circuit Judge.*

This appeal requires us to determine both the appealability and correctness of a district court's order refusing to suppress the use of property as evidence and to direct its return, where such property was seized by arresting agents as the result of a search allegedly made in violation of the Constitution.

Appellant Mercer and one Zilka were arrested by agents of the Treasury Department at a railroad siding where sugar was being unloaded from a boxcar into a tractor-trailor. The agents searched Mercer and the tractor-trailor and seized the following property: four hundred bags of sugar, one hand truck, one dock ramp, the tractor-trailer, and currency that was on Mercer's person. Murphy, the other appellant, voluntarily sur-

rendered a few days after these arrests. The agents did not have warrants to make the arrests or conduct the searches.

After waiving a hearing before a Commissioner on a complaint charging them with possession of sugar and other property in violation of 26 U.S.C. § 5686(a),[1] a misdemeanor, appellants were held over to await action of the grand jury. Thereafter, while on bail and before indictment, appellants filed a motion under Rule 41(e) of the Federal Rules of Criminal Procedure in the district court to suppress the use of the seized property as evidence and to order its return, alleging that it was seized in violation of the Constitution. The motion was denied and this appeal followed.

During argument on the merits, this court, *sua sponte*, raised the question of the appealability of the order, i.e., was it a final decision under 28 U.S.C. § 1291. Appellants contend that the order is final because the motion was filed before an indictment was returned. The government contends, however, that the order is interlocutory on the ground that the primary purpose of the motion was to suppress use of the property as evidence, and that its return is only sought incidentally. We think that our prior holdings in United States v. Bianco, 189 F.2d 716 (C.A.3, 1951), and In re Sana Laboratories, Inc.,

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[1] "(a) General. It shall be unlawful to have or to possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both." 26 U.S.C. § 5686(a).

115 F.2d 717 (C.A.3, 1940), cert. denied, Sana Laboratories, Inc. v. United States, 312 U.S. 688 (1941), support appellants' position and are binding on us.[2]

Appellants and the government recognize, as indeed they must, that the legality of the search and seizure depends upon the validity of the arrests. The appellants contend that the arrests were unlawful because, as they say, the arresting agents did not have probable cause to believe that a misdemeanor was being committed in their presence. The government contends, and the district court found, that probable cause existed.

The authority of the arresting agents is contained in 26 U.S.C. § 7608, which reads as follows:

"Authority of Internal Revenue Officers.

"Any investigator, agent, or other internal revenue officer by whatever term designated, whom

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[2] The writer of this opinion has serious doubts as to the correctness of these decisions, for he thinks that "criminal proceedings" were commenced, as that term is used in Cogen v. United States, 278 U.S. 221, (1929), so as to make the order interlocutory and not appealable once the appellants were brought before the Commissioner, and it was not necessary that they first be indicted. This same conclusion was reached in Zacarias v. United States, 261 F.2d 416 (C.A.5, 1958), cert. denied, 359 U.S. 935 (1959). In denying certiorari in *Zacarias*, the Supreme Court cited Carroll v. United States, 354 U.S. 394 (1957). In *Carroll* it was said, at page 403, that "The instances in criminal cases are very few" where an order denying a motion to suppress evidence will be considered final. The holding in *Zacarias* was recently followed in Saba v. United States, 282 F.2d 255 (C.A.5, 1960), petition for cert. filed, 29 U.S.L. Week 3213 (U.S. Jan. 10, 1961) (No. 643), and Saba v. United States, 283 F.2d 244 (C.A.5, 1960). For a collection of authorities, see Annot., 156 A.L.R. 1207 (1945).

> the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of Subtitle E or any other law of the United States * * * many—
>
> * * *
>
> "(3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence * * *."

Enacted in 1958, this provision was not meant to change or in any way limit the then existing authority of internal revenue agents to make arrests or conduct searches as an incident thereto.[3]

The Court made it clear in Carroll v. United States, 267 U.S. 132, 156-157 (1925), that an officer can make an arrest without first securing a warrant where he has probable cause to believe that a misdemeanor is being committed in his presence.[4] Probable cause does not require, as the Supreme Court has so frequently said, that the arresting officers have evidence to establish criminal guilt. Brinegar v. United States, 338 U.S. 160 (1949). On the other hand, a mere inkling or suspicion is not enough. United States v. Walker, 246 F.2d 519 (C.A.7, 1957). "Probable cause," Justice Douglas said in Henry

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[3] 3 U.S. Code Cong. & Ad. News, 85th Cong., 2d Sess., 1958, pp. 4395, 4605.

[4] Even before *Carroll*, the court in Garske v. United States, 1 F.2d 620, 622 (C.A.8, 1924) said: "It is the well-established doctrine now throughout the United States that for a crime, which they have reasonable cause to believe is being committed in their presence, thought it be a misdemeanor, duly authorized peace officers may make arrest without a warrant."

v. United States, 361 U.S. 98, 102 (1959), "exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed." We turn, then, to determining whether the arresting officers here knew and saw enough at the time of the arrests to permit them, as prudent men, to believe that a misdemeanor was being committed in their presence. Based on the uncontradicted facts in the record, we think that the answer is yes.

On August 26, 1960, Jennis, an investigator for the Alcohol and Tobacco Tax Unit of the Treasury Department, took a position from which he observed a boxcar, containing sugar, that was standing on a railroad siding in Forestville, Pennsylvania. The shipment was consigned to the "Murphy Products Company, Harrisville, Pa. (Sub Zilka Flour Co.)", meaning, thereby, that the Zilka Flour Company, as subconsignee, was to be notified upon arrival of the boxcar at the siding.

From his position, Jennis on August 27 observed a tractor-trailer coming north on Route 8 and then pull into a railroad siding on the right side of the roadway. Though he came over to the vehicle which bore North Carolina license plates, Jennis was unable to identify the driver who in the meantime had lain down in the sleeper of the tractor-trailer.

While keeping the tractor-trailer under observation, Jennis saw and recognized Bernard Zilka of the Zilka Flour Company in Monessen, Pennsylvania, dismount from an automobile that pulled into the railroad siding. After talking to a man at the boxcar, which he examined, Zilka departed from the scene only to return in about an hour accompanied by Mercer.

A group of men then commenced to unload sugar from the boxcar into the tractor-trailer that Jennis had earlier seen. Together with fellow agents, Jennis drove up to the unloading operation where he saw and, from a photograph that had previously been supplied to him, recognized Mercer in the cab of the tractor-trailer. At this time, Jennis, based on information that he had received form other agents, knew that Mercer had been arrested by Treasury agents at 3:00 A.M. sometime in May, 1960, on a country road in North Carolina while unloading three hundred and forty-eight bags of sugar from a truck. A receipt for this sugar, issued by the Zilka Flour Company, was found in Mercer's pocket at that time. Also, Mercer had a reputation for being one of the "largest sugar distributors to bootleggers in the State of North Carolina," and owned a business known as the Mercer Milling Company, described as a fictitious enterprise, and located in an area of considerable illicit distilling activity. Jennis also knew that both the Mercer Milling Company and the Zilka Flour Company had to make daily reports to the Treasury Department concerning the particulars of their individual sugar transactions. This procedure is used where it is suspected that sugar is being diverted for illegal purposes. Mercer was arrested and searched. Jennis proceeded to the boxcar where he arrested Zilka who was unloading the sugar. Immediately after these arrests, the property heretofore mentioned was seized.

This chain of events, together with the knowledge that the arresting agents had of Mercer's activities, fully substantiates the existence of probable cause. We are not reluctant to say that the agents would have been derelict had they not acted when they did.

Appendix.

This case is similar in all essential respects to Draper v. United States, 358 U.S. 307 (1957), where narcotics agents had received information from a paid informer that Draper, an alleged narcotics peddler, would arrive in Denver from Chicago while having heroin in his possession. The informer gave the agents Draper's physical description and said that he would be carrying a tan zipper bag and that he usually walked "fast." On the basis of this information, agents arrested Draper as he alighted from a Chicago train. Here, and we think this case is even stronger, Jennis had previously seen a picture of Mercer and was well acquainted with his general reputation and prior arrest, based on information that he had received from other agents of the Treasury Department. Also, the agents here did in fact see the sugar being unloaded, while in *Draper* there is no reason to think that the agents saw the heroin.

Because of our conclusion that probable cause existed, we need not concern ourselves with appellants' contention that a misdemeanor was not committed. We have fully considered the other questions appellants raise and find no error.

The order of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,424

UNITED STATES OF AMERICA
v.
JAMES MURPHY and ROBI MERCER, *Appellants*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: KALODNER and STALEY, *Circuit Judges;* and FORMAN, *Senior Circuit Judge.*

Judgment

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of September 26, 1960 of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

May 19, 1961

SEP 13 1961
JAMES R. BROWNING, Clerk

No. 317

In the Supreme Court of the United States

OCTOBER TERM, 1961

JAMES MURPHY AND ROBI MERCER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Statutes involved	2
Statement	3
Argument	6
Conclusion	9

CITATIONS

Cases:

Brinegar v. *United States*, 338 U.S. 160 8

Carlo v. *United States*, 286 F. 2d 841, certiorari denied, 366 U.S. 944 4

Carroll v. *United States*, 267 U.S. 132 8

Chapman v. *United States*, 289 F. 2d 539 7

De Hart v. *United States*, 237 F. 2d 227 6

DiBella v. *United States*, 284 F. 2d 897 4

Grogan v. *United States*, 261 F. 2d 86, certiorari denied, 359 U.S. 944 8

Henry* v. *United States, 361 U.S. 98 8

Saba v. *United States*, 282 F. 2d 255 4

Statutes:

26 U.S.C. 5686(a) 2, 3, 6, 7

26 U.S.C. 7302 ..... 3, 6, 7

26 U.S.C. 7608 ..... 2, 7

308318—61

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 317

JAMES MURPHY AND ROBI MERCER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13–19) is reported at 290 F. 2d 573.

JURISDICTION

The judgment of the court of appeals was filed on May 19, 1961. Petition for rehearing was denied on May 25, 1961. The petition for a writ of certiorari was filed on August 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a truck and sugar being loaded thereon and other related materials were properly seized as

property intended for use in violation of the internal revenue laws.

STATUTES INVOLVED

26 U.S.C. 7608 provides in pertinent part:

> Any investigator, agent, or other internal revenue officer by whatever term designated, whom the Secretary or his delegate charges with the duty of enforcing any of the criminal, seizure, or forfeiture provisions of subtitle E or of any other law of the United States pertaining to the commodities subject to tax under such subtitle for the enforcement of which the Secretary or his delegate is responsible, may—
>
> * * * * * *
>
> (3) in respect to the performance of such duty, make arrests without warrant for any offense against the United States committed in his presence, or for any felony cognizable under the laws of the United States if he has reasonable grounds to believe that the person to be arrested has committed, or is committing, such felony; and
>
> (4) in respect to the performance of such duty, make seizures of property subject to forfeiture to the United States.

26 U.S.C. 5686(a) provides:

> It shall be unlawful to have or possess any liquor or property intended for use in violating any provision of this chapter or regulations issued pursuant thereto, or which has been so used, and every person so having or possessing or using such liquor or property, shall be fined not more than $5,000, or imprisoned not more than 1 year, or both.

26 U.S.C. 7302 provides:

> It shall be unlawful to have or possess any property intended for use in violating the provisions of the internal revenue laws, or regulations prescribed under such laws, or which has been so used, and no property rights shall exist in any such property. A search warrant may issue as provided in chapter 205 of title 18 of the United States Code and the Federal Rules of Criminal Procedure for the seizure of such property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal revenue laws, or of any other law. The seizure and forfeiture of any property under the provisions of this section and the disposition of such property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal revenue laws.

STATEMENT

In the Western District of Pennsylvania petitioners and another were charged in a complaint filed with the United States Commissioner with unlawful possession of "property intended for use in violating" federal liquor laws (26 U.S.C. 5686(a)). Petitioners waived a hearing before the Commissioner on August 31, 1960. Before indictment, petitioners moved for the return of certain property seized and its suppression as evidence against them on the ground that the

arrest and seizure were executed without a warrant. The motion was denied by the district court. The court of appeals affirmed the judgment of the district court on May 19, 1961.[1]

The evidence at the hearing on the motion to suppress showed that the federal alcohol agents were aware that a carload of sugar was arriving at a private siding owned by petitioner Murphy at Forrestville, Pennsylvania (R. 2b, 4b). At about 2:00 p.m. on Thursday, August 25, 1960, a freight car loaded with four hundred 100-pound bags of sugar did arrive at the siding. Agents kept the freight car under surveillance. The sugar was billed to the "Murphy Products Company, Harrisville, Pennsylvania (Sub Zilka Flour Company)" and was purchased by Murphy through a broker. The designation "Sub Zilka Flour Co." indicated that the Zilka Flour Company of Monessen, Pennsylvania, a firm required by the Treasury Department regularly to report its sugar inventory and sales because of suspected diversion of

[1] A question of the appealability of such a motion made prior to indictment was raised by the court below. It is the government's position that in the circumstances of this case where before indictment there is a request for the return of property (here sugar, certain equipment, vehicles and currency) which in itself is not contraband, the order is appealable. *Carlo* v. *United States*, 286 F. 2d 841 (C.A. 2), certiorari denied, 366 U.S. 944. In the government's view a different situation is presented where the sole purpose of the motion is to suppress the use of evidence in the criminal proceeding. This is the position it is taking in *DiBella* v. *United States*, 284 F. 2d 897 (C.A. 2), pending on writ of certiorari, No. 21, this Term; cf. *Saba* v. *United States*, 282 F. 2d 255 (C.A. 5), pending on petition for a writ of certiorari, No. 34, this Term.

sugar for illegal purposes, was to be notified upon arrival of the freight (R. 4b, 5b)..

Two days later, August 27, 1960, about 11:20 a.m., petitioner Mercer, owner of the Mercer Milling Company, of Wilson, North Carolina, also a firm required to report its sugar inventory and sales to the Treasury Department, arrived at the siding driving a tractor-trailer, registered in the name of the Mercer Milling Company (R. 2b–3b). The Mercer Milling Company was known not to be a functioning business (R. 5b).

At about 12:30 that same day, co-defendant Zilka arrived at the railroad siding. Soon thereafter, two men, later identified as regular employees of the Murphy Products Company, arrived and began to unload the sugar from the freight car and load it into petitioner Mercer's tractor trailer (R. 2b–3b). Zilka assisted in the transfer while Mercer remained in the cab of the tractor trailer. The whole transaction was observed by Treasury agents. Zilka and Mercer were recognized by the agents as suspected sugar diverters (R. 2b–3b). In fact Agent Scalera testified that he had apprehended petitioner Mercer unloading 348 bags of sugar into a rural smokehouse at 3:00 a.m. some two months prior to the instant arrest and had found a receipt for the sugar from co-defendant Zilka's company on Mercer's person (R. 4b–5b). Agent Jennis also testified that he had knowledge of the bill of lading involved in the instant transaction (Pet. 7).

After the loading of sugar onto the trailer truck commenced, the Treasury agents arrested Mercer and

Zilka. The agents seized the four hundred bags of sugar, a two-wheeled hand truck, one dock ramp, the tractor-trailer, and $3,546.00 in currency from Mercer. Petitioner Murphy was arrested on August 29, 1960, at the office of the United States Commissioner.

ARGUMENT

The evidence summarized in the Statement shows that, as both courts below found, the agents had probable cause to believe that the sugar being loaded onto the tractor-trailer, the trailer itself, and the other property seized constituted property intended to be used in violation of the internal revenue laws. They therefore had reasonable cause to believe that the property was subject to forfeiture under 26 U.S.C. 7302 and that petitioner Mercer was then and there committing an offense under 26 U.S.C. 5686(a). At the time of the seizure the agents saw two persons, Mercer and Zilka, suspected of diverting sugar for illegal purposes. Mercer had previously been arrested for a similar offense involving sugar sold to him by Zilka. The transfer of the sugar was taking place in an isolated area far from the place of business of the individuals involved. Mercer, the proprietor of a non-functioning business, had come from North Carolina for a commodity readily obtainable in his own area. The Zilka Flour Company's place of business was also a considerable distance from the siding. All of these facts and circumstances were sufficient to constitute probable cause to believe that an offense was being committed. See *De Hart* v. *United States*, 237 F. 2d 227 (C.A. 4), where a con-

viction on substantially similar evidence was upheld.

Petitioners argue that the arrest of Mercer and Zilka was nevertheless illegal because the offense under 26 U.S.C. 5686(a) is a misdemeanor and under 26 U.S.C. 7608 internal revenue agents have authority to arrest for a misdemeanor only when it is being committed in their presence. They argue that the offense was not being committed in the presence of the officers since the agents had to rely on past knowledge for the element of intent. A similar contention is before the Court in *Chapman* v. *United States*, No. 287 Misc. this Term, the Court of Appeals for the Fifth Circuit having ruled, on similar facts, in accord with the ruling below, that the events witnessed by the agents, plus the knowledge they already had, justified them in concluding that an offense was being committed in their presence. *Chapman* v. *United States*, 289 F. 2d 539. As in *Chapman*, there is no question that the agents here saw the possession. While intent cannot of course be seen, the total circumstances observed by the agents, discussed above, made it apparent to them that the intent did then exist. Therefore, the total offense—including possession and intent—was being committed in the presence of the agents.

In any event, the seizure may be justified without regard to the validity of the arrest. As noted at the outset, there was clearly probable cause to believe that the tractor trailer, a movable vehicle, and the sugar being transferred thereto, were subject to forfeiture under 26 U.S.C. 7302 as property intended to be used

in violation of the internal revenue laws. The decisions of this Court in *Brinegar* v. *United States*, 338 U.S. 160, and *Carroll* v. *United States*, 267 U.S. 132, establish that a movable vehicle may be searched without a warrant on probable cause to believe that it is being used in violation of the laws of the United States and that property being so used may be seized.[2] The right at issue is the right to search and to seize, independent of the right to arrest. Because of the mobile nature of the vehicle, the search and seizure, even though without a warrant, are regarded as reasonable under the Fourth Amendment if made on probable cause to believe that the vehicle is being used in violation of law. That reasoning applies here. The agents saw the sugar being loaded in Pennsylvania on a truck belonging to Mercer who lived in North Carolina. Before they could get a warrant, the truck could have been on its way and the sugar disposed of. While the agents knew beforehand that the sugar was coming, they did not know until they saw him that Mercer from North Carolina was picking it up. They therefore had the right to seize the truck and its contents on probable cause to believe that it was being used to violate the law. See *Grogan* v. *United States*, 261 F. 2d 86 (C.A. 5), certiorari denied, 359 U.S. 944, where the seizure of a truck and sugar and the subsequent forfeiture thereof were upheld on the basis of

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[2] *Henry* v. *United States*, 361 U.S. 98, does not change this principle. The Court merely found on the facts of that case that the agents did not have information amounting to probable cause before they stopped the vehicle.

the right to search movable vehicles, the court finding it unnecessary to decide whether there was a right to arrest for a misdemeanor.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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